APPENDIX A

MICHIGAN SUPREME COURT
February 27, 2007

BERNARD PENZIEN and KAREN PENZIEN,

Plaintiffs-Appellants,

v.

VILLAGE OF CAPAC,

Defendant-Appellee,

and

DEPARTMENT OF TREASURY,

Defendant.

SC: 131840, 131841
COA: 259536, 259540
St. Clair CC: 04-000508-CC

ORDER

On order of the Court, the application for leave to appeal the June 29, 2006 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 27, 2007 /s/Corbin Davis
Clerk

APPENDIX B

STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
June 29, 2006

No. 259536
St. Clair Circuit Court
LC No. 04-000508-CC

BERNARD PENZIEN and KAREN PENZIEN,

Plaintiffs-Appellants,

v.

VILLAGE OF CAPAC,

Defendant-Appellee,

and

DEPARTMENT OF TREASURY,

Defendant.

No. 259540
St. Clair Circuit Court
LC No. 04-000508-CC

BERNARD PENZIEN and KAREN PENZIEN,

Plaintiffs-Appellees,

v.

VILLAGE OF CAPAC,

Defendant-Appellant,

and

DEPARTMENT OF TREASURY,

Defendant.

Before: Cooper, P.J., and Neff and Borrello, JJ.

PER CURIAM

In docket number 259536, plaintiffs appeal as of right and challenge the trial court's grant of summary disposition to defendant Village of Capac (defendant) on counts II through V of plaintiffs' complaint. In docket number 259540, defendant appeals as of right and challenges the trial court's grant of summary disposition to plaintiffs on count I of their complaint and removal of a demolition lien defendant had placed on plaintiffs' property. For the reasons set forth in this opinion, we affirm the trial court's granting

of summary disposition to defendants but reverse the trial court's grant of summary disposition to plaintiff.

This case arises from the demolition of a building that was damaged by a fire in November 1999. Plaintiffs owned the land where the building was located, but had entered into a land contract for its sale with Sam Dado, Luay Jeddo, and Salah Hermiz in 1997. In 1998, the vendees' land contract interest was assigned to Holmes Enterprises Incorporated (Holmes). After the fire, repairs were not made to the building and at a village council hearing in March 2002, the building was declared a dangerous building that was to be repaired, demolished, or otherwise made safe. Notice of the hearing was sent to Holmes and posted at the location. Plaintiffs were not sent notice of the hearing.

Holmes unsuccessfully appealed defendant's dangerous building determination to the circuit court. The court entered a judgment against Holmes, allowed the building to be demolished, and awarded a lien against the property for the costs of demolition. On October 23, 2002, defendant had the building demolished. On February 19, 2002, defendant recorded a lien for $51,239 against the property, listing plaintiffs as the owners of the property, subject to Holmes' land contract interest. On March 26, 2003, plaintiffs received possession of the property after a land contract forfeiture action based on non-payment. On March 1, 2004, plaintiffs filed this action against defendant to quiet title and for damages for constitutional violations, inverse condemnation, violation of substantive due process, and trespass.[1] The trial court granted defendant summary disposition on all of plaintiffs' claims except the quiet title

[1] The Complaint also listed the Department of Treasury as a defendant, as apparently the Department filed tax liens against Holmes in January and May 2002. The Department never filed an answer and was defaulted by the trial court.

claim. Subsequently, the trial court determined that the demolition lien was extinguished by plaintiffs' land forfeiture action and removed the lien from plaintiffs' title. Plaintiffs and defendant now appeal.

Plaintiffs argue that the trial court erred in granting summary disposition for defendants on their claims for damages. This Court reviews a trial court's ruling on a motion for summary disposition do novo. *Maskery* v *Univ of Michigan Bd of Regents*, 469 Mich 609, 613, 664 NW2d 165 (2003). Additionally, "whether constitutional due process applies and, if so, has been satisfied are legal questions reviewed de novo." *Reed* v *Reed*, 265 Mich App 131, 157; 693 NW2d 825 (2005).

All of plaintiffs' claims for damages are based on an allegation that plaintiffs were deprived of their procedural due process rights when defendant demolished the building without notice to them. Plaintiffs claim due process requires notice be given to a land contract vendor. Plaintiffs also claim that the village ordinance and the state statute that defendant relied on to give notice are unconstitutional.[2] Plaintiffs' assert that despite the fact Holmes appeared on the tax rolls, and notice of demolition was sent to Holmes and allegedly posted on the building, the village could have easily discovered plaintiffs were the actual title holders and accordingly sent them notice. Failure to undertake this simple step violated plaintiffs' constitutional guarantee of due process.

"The federal and Michigan constitutions guarantee that persons may not be deprived of life, liberty, or property without due process of law." *Hanlon* v *Civil Service Comm*,

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[2] The village ordinance is based on MCL 125.540 and has similar notice requirements. Defendant, however, appeared to have relied on MCL 125.540 when providing notice in this case.

253 Mich App 710, 722; 660 NW2d 74 (2002), citing US Const, Am V; Const 1963, art 1, § 17. The Michigan Constitution, provides no greater due process protection than the federal due process guarantee. *English* v *Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 459; 688 NW2d 523 (2004). When evaluating a due process claim, courts are to first determine "'[w]hether" any procedural protections are due' and then decide[] 'what process is due.'" *Dow* v *Michigan*, 396 Mich 192,203; 240 NW2d 450 (1976), quoting *Morrissey v Brewer*, 408 US 471; 92 S Ct 2593; 33 L Ed 2d 484 (1972). The United States Supreme Court has determined that the phrase "due process of law" entitles individuals whose property interests, are at stake "to 'notice and an opportunity to be heard.'" *Dusenbery v United States*, 534 US 161, 167; 122 S Ct 694; 151 L Ed 2d 597 (2002), quoting *United States v James Daniel Good Real Property*, 510 US 43, 48; 114 S Ct 492; 126 L Ed 2d 490 (1993). When determining whether the notice given is sufficient for due process purposes, courts are to determined whether the notice was "'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity *to* present their objections.'" *Id.* at 168, quoting *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314, 319; 70 S Ct 652; 94 L Ed 865 (1950).

Both a titleholder and a land contract purchaser have a due process interest in the property that is the subject of the land contract. *Brandon Twp v Tomkow*, 211 Mich App 275, 282; 535 NW2d 269 (1995). Therefore, it is clear that plaintiffs have a due process interest in the land. However, due process does not require actual notice to an interested party, only that the effort in giving notice be reasonably calculated to apprise interested parties of the action. *Dusenbery, supra* at 170-171. The question becomes

whether defendant's notice to Holmes was constitutionally sufficient.

In this case, defendant sent notice pursuant to, and in compliance with, MCL 125.540 and the trial court found that compliance with the statute was constitutionally sufficient to protect plaintiffs' due process rights. MCL 125.540(2) states that notice must be served on "each owner of or party in interest in the building or structure in whose name the property appears on the last local tax assessment records." Further, MCL 125.540(5) provides that notice should also be *posted* at the building or structure. No one disputes that defendant complied with the statute. However, plaintiffs claim that because they had an interest in the property, they should have received actual notice. We conclude that defendant's compliance with the statute adequately protected plaintiffs' due process rights.

Recently, in *Jones v Flowers*, 547 US ____; 126 S Ct 1708; 164 L Ed 2d 415 (No. 04-1477, decided April 26, 2006), the United States Supreme Court addressed what notice is due to an owner before a state can take property pursuant to a tax sale. In *Jones,* Arkansas sent notice of a delinquency in taxes to the owner by certified mail to the address on the tax records. The notice was returned to the state as unclaimed, and the state sent no further notice to the plaintiff before selling the land in a private sale. *Id.*, slip op at 1-2. *Jones* held "that the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Id.*, slip op at 4. In reaching this holding, the Court noted that the facts in the case were distinguishable from prior Supreme Court precedent because in the prior cases "the government attempted to provide notice and heard nothing back indicating that anything had gone awry." *Id.*, slip op at 5. The Court also stated that when the government

received the certified letter returned as undeliverable, the government should have taken additional steps to notify the owner, "if practicable to do so." *Id.*, slip op at 12. The Court noted that there were reasonable options for the government in *Jones to* provide notice, such as resending the notice by regular mail, or posting the notice at the property addressed to the occupant. *Id.*, slip op at 13-14. However, the Court also concluded that the government is not required to search for a new address for the property owner. "An open-ended search for a new address--especially when the State obligates the taxpayer to keep his address updated with the tax collector . . .--imposes burdens on the State significantly greater than the several relatively easy options outlined above." *Id.*, slip op, at 14.

Defendant complied with MCL 125.540 by mailing notice to Holmes and posting notice at the building location. Unlike *Jones,* where the state received the notice returned to it as unclaimed, in this case Holmes received the notice and appeared at the hearing. There was nothing to alert defendant that it needed to provide any further notice to another party. Although plaintiffs assert that "[f]or the simple cost of $190.00, [defendant] could have obtained title work and determined the title to the property," the statute does not require defendant to do this. *Jones* stands for the proposition that a governmental entity does not have the obligation to search government records for a new address, and by inference is not required to perform a title search.[3] MCL 125.540 provides for a means of giving notice that is reasonably calculated to give notice to interested parties, and defendant did not have any indication that the notice it sent did not notify the proper parties. The fact that plaintiffs had

[3] While we hold that plaintiffs' constitutional guarantees of due process were met by defendant, we are sympathetic to plaintiffs' argument that the village should be mandated to perform a simple title search. Based on current case law, such change must emanate from the legislature.

an interest in the property and did not receive actual notice is insufficient to demonstrate that the notice requirements of MCL 125.540 are constitutionally insufficient.[4]

Therefore, because plaintiffs' claims for damages were all based on alleged violations of due process and because we determine that defendant complied with constitutional standards of due process when sending notice, the trial court properly granted defendant summary disposition.[5] To the extent that plaintiffs raise a facial challenge to the constitutionality of MCL 125.540, we conclude that in most instances notice provided pursuant to the statute will provide actual notice to the property owner, and therefore, plaintiffs' facial challenge fails. See *Council of Organizations v Governor,* 455 Mich 557, 568; 566 NW2d 208 (1997) (noting that a party challenging the facial constitutionality of a statute must show that there are no circumstances in which the statute would be valid).

Defendant argues on appeal that the trial court erred in concluding that plaintiffs' land contract forfeiture extinguished the demolition lien. We review a motion to quiet title de novo. *Fowler v Doan,* 261 Mich App 595, 598; 683 NW2d 682 (2004). Initially, we note that the trial court correctly concluded that MCL 125.541 governed the lien in this can. However, we conclude that the trial court erred when it found that plaintiffs' land contract interest was a prior lien or encumbrance that would take priority over defendant's demolition lien.

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[4] The record is not entirely clear how plaintiffs did receive notice, however we note that plaintiffs attempted to intervene in the underlying action, but according to plaintiffs' counsel, by the time plaintiffs discovered the proceeding, the trial court had already ruled that the village was entitled to demolish the building.

[5] In light of our conclusion, we also conclude that the trial court properly denied plaintiffs' motion for reconsideration.

According to the statute, defendant's demolition lien is subject to any prior recorded lien or encumbrances. MCL 125.541(6). Our Supreme Court has defined a lien or encumbrance as follows:

> In *Post v Campau*, 42 Mich 90, 94-95; 3 NW 272 (1879), we defined an encumbrance to include anything which
>
> > "constitutes a burden upon the title; a right of way,. . . a condition which may work a forfeiture of the estate, . . . a right to take off timber, . . . a right of dower, whether assigned or unassigned . . . . In short, 'every right to, or interest in the land, to the diminution of the value of the land, *but consistent with the passage of the fee by the conveyance.*'" (Emphasis supplied.)
>
> Hence, although an encumbrance is typically adverse to the interest of the landowner, it does not conflict with his conveyance of the land in fee. A lien is one type of encumbrance. *[Darr v First Fed S & L Ass'n of Detroit,* 426 Mich 11, 20; 393 NW2d 152 (1986).]

Plaintiffs' interest in the land initially was that of a land contract vendor, with Holmes as the land contract vendee. Therefore, before the land contract forfeiture, plaintiffs held legal title in the land subject to Holmes' equitable interest. *Id.* at 19-20. This type of fee interest is not equivalent to a lien or encumbrance on the property. See *id.* at 21 (stating that "[a] land contract vendee's or vendor's lien is not a property right in or right to the land itself, it constitutes instead, a charge or security in the land."). Therefore, the

trial court erred when it determined that plaintiffs' fee interest was a prior recorded encumbrance on the land that was superior to defendant's demolition lien.

Plaintiffs argue that the lien only attached to Holmes equitable interest and not to the land. However, defendant's lien attached to the property itself, not just Holmes' equitable interest. MCL 125.541(7); see also *Franken Investments, Inc v Flint,* 218 F Supp 2d 876, 882 (ED Mich, 2002) (stating that "[d]emolition costs are 'charged against the land' if the requirements of . . . [the statute] are met."). The land contract forfeiture proceedings removed Holmes equitable interest and any encumbrances that attached to it could not remove defendant's lien, which attached to the property itself.

MCL 125.541(6) states that a lien for demolition costs shall "be collected and treated in the same manner as provided for property tax liens under the general property tax act [MCL 211.1 *et seq].*" MCL 211.40 states, in part, that a lien for real estate or personal property taxes "shall continue until paid." Plaintiff argues MCL 211.40 does not apply to defendant's lien for demolition costs because it does not address "the collection" of a lien. However, MCL 211.40 does address the treatment of a lien. Further, contrary to plaintiffs' argument, MCL 211.40, combined with the language of MCL 125.541(6), does not limit its application to only special assessments or tax liens. MCL 125.541(6) states that, even though the demolition lien is not a special assessment or a tax lien, it is to be treated as provided in the General Property Tax Act. Again MCL 211.40 states that the lien is to continue until paid. Therefore, because plaintiffs have not shown a prior recorded encumbrance on the land or that the lien was attached only to Holmes' equitable interest under the land contract, defendant's lien for demolition costs was not extinguished by the land

contract forfeiture action and according to MCL 211.40, continues until paid. Therefore, the trial court erred in removing the demolition lien from plaintiffs' title.

Plaintiffs argue that allowing the demolition lien to remain on their title without notice of the hearing in which the lien was issued violates their due process rights. However, we previously concluded that the notice defendant gave complied with due process. Plaintiffs also argue that MCL 125.541 is unconstitutional, making an identical challenge to the challenge discussed previously regarding MCL 125.540. Therefore, for the same reasons discussed in reference to MCL 125.540, we conclude that plaintiffs have not shown that MCL 125.541 is unconstitutional. In light of our conclusions, we also need not reach defendant's argument that res judicata barred this action.

Affirmed in part, reversed in part, and remanded for entry of an order consistent with this opinion. We do not retain jurisdiction.

/s/Jessica R. Cooper
/s/Janet T. Neff
/s/Stephen L. Borrello

APPENDIX C

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF ST. CLAIR

BERNARD PENZIEN and KAREN PENZIEN,

Plaintiffs,

vs.

VILLAGE OF CAPAC, a Michigan Municipal Corporation, and MICHIGAN DEPARTMENT OF TREASURY, an Agency of the State of Michigan.

Defendants.

Case No. K-04-000508-CC
Hon. Daniel J. Kelly

ORDER GRANTING DEFENDANT VILLAGE OF CAPAC'S MOTION FOR SUMMARY DISPOSITION AS TO COUNTS II THROUGH V

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At a session of said Court, continued and held at the County Building, City of Port Huron, County and State aforesaid, this 14th day of June, 2004.

PRESENT: Hon. Daniel J. Kelly, Circuit Judge

This matter having come before the Court on Defendant Village of Capac's Motion for Summary Disposition, pursuant to MCR 2.116(c)(7) & (10), briefs having been submitted by the parties, oral arguments having been taken, and the Court having issued a written Opinion dated May 17, 2004, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that Defendant Village of Capac's Motion for Summary Disposition, pursuant to MCR 2.116(c)(10) [res judicata] is hereby denied for reasons more fully set forth in the Opinion of the Court dated May 17, 2004, which is hereby incorporated by reference.

IT IS HEREBY ORDERED that Defendant Village of Capac's Motion for Summary Disposition, pursuant to MCR 2.116(10) as it relates to Counts II, III, IV and V be and same is hereby granted for the reasons more fully set forth in the Court's Opinion dated May 17, 2004.

This Order only resolves Counts II, III, IV and V. Count I of Plaintiff's Complaint still remains unresolved and the case remains open.

/s/Daniel J. Kelly
HON. DANIEL J. KELLY
Circuit Judge

Approved for Entry as to form only:

/s/David R. Heyboer
DAVID R. HEYBOER (P-27975)
Attorney for Plaintiff

/s/James E. Tamm
JAMES E. TAMM (P-38154)
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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF ST. CLAIR

BERNARD PENZIEN and KAREN PENZIEN,

Plaintiffs,

vs.

VILLAGE OF CAPAC, a Michigan Municipal Corporation, and MICHIGAN DEPARTMENT OF TREASURY, an Agency of the State of Michigan.

Defendants.

Case No. K-04-000508-CC
Hon. Daniel J. Kelly

OPINION ON MOTION FOR SUMMARY DISPOSITION
May 17, 2004

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This case arises out of the demolition of a fire-damages building located at 101-13 S. Main Street in the Village of Capac. Plaintiffs, Bernard and Karen Penzien, are assignees of the Bernard P. Penzien Revocable Living Trust, which sold the property on land contract to Sam Dado in 1997. The terms of the land contract provided that the purchaser would pay all taxes and assessments levied on the premises and keep the buildings on the premises insured against loss and damage. Mr. Dado subsequently assigned his purchaser's interest in the land contract to Holmes Enterprises in 1998 in a document that was prepared, witnessed, and signed by Bernard Penzien, who is an attorney in Imlay City.

In 1999, the building at 101-103 S. Main Street caught fire. On March 18, 2002, the Capac Village Council held a public hearing at which it was determined, based on a report from Dunn Engineering, that the building had serious structural defects as a result of the fire, and was a "dangerous building as defined by the Capac Ordinances." The Village sent notice to Holmes Enterprises, pursuant to local ordinance, because Holmes was the entity that appeared on the local tax assessment records. Holmes was then given twenty days to repair, demolish, or make the building safe. No notice of any kind was ever sent to the Penziens.

Holmes challenged the Village's determination in Circuit Court, arguing that the Village's determination about the building was arbitrary and capricious, thereby violating Holmes' due process rights. The Village prevailed in this action, and the Court issued an order on September 19, 2002, stating that Holmes was to tear down the building, or allow

the Village to do so at Holmes' expense. Plaintiffs were not a party to this action in Circuit Court. The building was torn down by the Village on October 23, 2002, and a dangerous building assessment lien was placed on the property on February 19, 2003, in the amount of $51,239.00, which represents the cost of the removal of the building.

Some time after the building was torn down, Holmes failed to make payments to Plaintiffs on the land contract, and Plaintiffs commenced a land forfeiture action against Holmes, the Village of Capac, and the State of Michigan on January 7, 2003. A Judgment was entered on March 26, 2003, setting forth a redemption amount of $54,510.50 and entitling Plaintiffs to possession of the property. On June 26, 2003, at the end of the 90-day statutory redemption period, a Writ of Restitution was issued, removing Holmes from the property.

Plaintiffs filed their Complaint in the instant suit on March 1, 2004, seeking to quiet title to the property by removing the tax assessment filed by the Village. Plaintiffs are also seeking damages based on allegations that the Village violated their due process rights when it did not give notice of its intention to demolish the building to Plaintiffs. Defendants filed the Motion for Summary Disposition in this case under MCR 2.116(C)(7) and (C)(10), arguing that they were only required by law to give notice to Holmes, and that Plaintiffs' claims are barred by the doctrine of res judicata. Plaintiffs have indicated in their response that they agree that no material issue of fact exists in this case; but Plaintiffs content that they are entitled to summary disposition. Not Defendants. For the reasons set forth more fully below, this Court finds that Defendants are not entitled to summary disposition under MCR 2.116(C)(7); however, summary disposition in favor of Defendants is appropriate under MCR

2.116(C)(10) as to Counts II through V of Plaintiffs' Complaint.

Both parties have extensively briefed the issue of whether this action is barred by the doctrine of res judicata. The doctrine of res judicata acts to bar the re-litigation of actions that have previously been reduced to a final judgment. This doctrine applies when 1) the prior action was decided on the merits; 2) the decree in the prior action was a final decision; 3) the matter contested in the second case was or could have been resolved in the first action; and 4) both actions involved the same parties or their privies. Michigan law defines res judicata broadly to preclude all claims actually litigated in the first action, as well as all claims that could have, with reasonable diligence, been raised but were not. *Dart v Dart*, 460 Mich 573 (19991). A prerequisite to a party's ability to invoke the doctrine of res judicata in a subsequent proceeding is that the party must have given adequate notice of the prior proceeding to the persons who are to be bound by the adjudication. *Viele v DCMA Intern, Inc.*, 211 Mich App 458 (1995).

Plaintiffs were not made a party to the prior action, and in order to find privity between a party and a nonparty, Michigan courts require "both a substantial identity of interests and a working or functional relationship . . . in which the interests of the non-party are presented and protected by the party in the litigation." *Phinisee v Rogers*, 229 Mich App 547, 553-54 (1998). In this case, Plaintiffs' interests were clearly not presented or protected by any party in the prior litigation in Judge Deegan's court. It appears from the materials submitted to this Court that Plaintiffs' interest in the property was never mentioned at any point. As Holmes and Plaintiffs cannot be considered to be the same party, or privies of each other, res judicata will not bar

Plaintiff's claim in the present suit. Therefore, summary disposition under MCR 2.116(C)(7) is improper.

Defendants have also moved for summary disposition under MCR 2.116(C)(10) on grounds that no material issue of fact remains and they are entitled to judgment that they did not violate Plaintiffs' due process rights as a matter of law. Plaintiffs contend that they were entitled to some sort of notice as the legal title holder of the property, and that merely sending notice to Holmes, the equitable owner, was insufficient to apprise Plaintiffs of their opportunity to be heard as an owner of the property. The Capac Village Code provides that when the whole or any part of any building or structure is found to be in a dangerous condition, notice shall be directed to the person in whose name the property appears on the most recent Village tax assessment records. Capac Village code, Article III., § 6-68. The Michigan Housing Code mirrors the Village ordinance, and states that notice shall be served on the owner, agent, or lessee that is registered with the enforcing agency, and if an owner, agent, or lessee is not registered, the notice shall be served on each owner of or party in interest in the building or structure in whose name the property appears on the last local tax assessment records. MCL 125.540.

The Village proceeded in giving notice in accordance with these authorities, and the method of mailing notice to the person listed on the tax assessment records has been upheld as constitutionally sufficient, even though that person is not the actual property owner. *Toussaint v City of Sterling Heights*, unpublished opinion per curiam of the Court of Appeals, decided May 15, 2003 (Docket No. 230265). The *Toussaint* case, although unpublished, is nevertheless instructive to this Court, because it deals with what notice is required for the removal of a dangerous condition where an owner's entire interest is not lost, as opposed to the notice

required in a tax sale where the entire interest in the property is at stake. In addition, *Toussaint* addresses a situation where notice was at least given to the party listed in the tax assessment records, where as many of the cases cited by Plaintiffs involve situations where no notice was given to anyone.

In the case before this Court, the land contract provided that the vendee wold be responsible for paying the taxes, and as a result, Holmes' name appeared in the tax records. The Village provided notice to Holmes in accordance with § 6-68 of the Capac Village Code and MCL 125.540. Under the circumstances of this case, such notice was constitutionally sufficient, especially in light of the fact that Plaintiffs were aware that the property had been damaged and were also aware that the Village had declared it a dangerous building. Therefore, there has been no violation of Plaintiffs' due process rights, and Defendants are entitled to judgment as a matter of law under MCR 2.116(C)(10) on these claims, which are set forth in Counts II, III, and IV of Plaintiff's Complaint. Consequently, Plaintiff is not entitled to any damages on these Counts.

As for Count V of Plaintiffs' Complaint, entitled "Trespass," Defendants are also entitled to judgment as a matter of law under MCR 2.116(C)(10), as Defendants entered the property at 101-103 S. Main Street pursuant to an order issued by Judge Deegan, which affirmed the decision of the Village of Capac to demolish the unsafe and dangerous building on the premises. Therefore, Plaintiffs are not entitled to damages for trespass.

With regard to Count I of Plaintiffs' Complaint, which contains the quiet title action, the Court will defer ruling on Defendant's motion for summary disposition on this issue. Plaintiffs' Complaint alleges that the liens of

Defendants are no longer of any force and effect because they did not redeem the amount necessary under the land contract. Plaintiffs request that this Court enter an order quieting title and declaring that these Defendants have no interest in the property. While Defendants appear to be seeking summary disposition on all counts, they have not set forth any arguments with regard to this particular issue; specifically, whether the tax liens of Defendants remain valid after the forfeiture of the land contract and the end of the redemption period when they did not redeem their interests. The parties may submit briefs on this issue within thirty days of the date of this Opinion, and may schedule oral arguments on this limited issue if they find it necessary.

For the reasons set forth above, Defendant's Motion for Summary Disposition is GRANTED as to Counts II through V of Plaintiff's Complaint. A separate Opinion will be issued with regard to Count I when supplemental materials are received from the parties. An order consistent with this Opinion may be presented for entry as provided by court rule.

Dated: 5-17-04 /s/Daniel J. Kelly
Hon. Daniel J. Kelly, Circuit Judge

APPENDIX D

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF ST. CLAIR

BERNARD PENZIEN and KAREN PENZIEN,

Plaintiffs,

vs.

VILLAGE OF CAPAC, a Michigan
Municipal Corporation, and
MICHIGAN DEPARTMENT OF TREASURY, an
Agency of the State of Michigan.

Defendants.

Case No. K-04-000508-CC
Hon. Daniel J. Kelly

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION, AS TO COUNT I JUDGMENT QUIETING TITLE REGARDING VILLAGE OF CAPAC, ONLY

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At a session of said Court, continued and held at the County Building, City of Port Huron, County and State aforesaid, this 24th day of November, 2004.

PRESENT: Hon. Daniel J. Kelly, Circuit Judge

This matter having come before the Court on Plaintiff's Motion for Summary Disposition on Count I of Plaintiff's Complaint, and the Court having issued an Opinion dated October 26, 2004, a copy of which is incorporated by reference, and the Court's Opinion having addressed the continued validity of Defendant Capac's liens, which are the subject matter of Count I of Plaintiff's Complaint, and the Court further finding that the liens of the Defendant Village of Capac do constitute an impediment and cloud against Plaintiffs' title and the Court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that Plaintiff's Motion For Summary Disposition as to Count I of Plaintiff's Complaint against Defendant Capac be and same is hereby granted for the reasons more fully set forth in the Opinion of this Court, dated October 26, 2004.

IT IS FURTHER ORDERED AND ADJUDGE that any and all liens and/or Judgments filed by or on the behalf of Defendant Village of Capac, against the subject real estate, including those recorded at Liber 2531, page 150; and Liber

2649, page 1, St. Clair County Records, be and same are hereby cancelled, discharged, released, and shall be of no further force and effect against Plaintiffs' property described as:

> Land in the Village of Capac, St. Clair County, Michigan, described as:
> The East 114 feet of Lot 1 and the East 114 feet of the North 10 feet of Lot 2, Block 1 North, Range 1 West, except the West 12 feet of Right-of-Way, Village of Capac, according to the plat thereof as recorded in Liber H of Plats, page 72, St. Clair County Register of Deeds Office.
> and commonly known as 101-105 S. Main Street, Capac, Michigan, tax id. # 74-27-950-0202-000.

IT IS FURTHER ORDERED that the Village of Capac and the St. Clair County Treasurer shall remove the sum of $51,602.83, from the 2003 July tax bill, (a copy of which is attached hereto and incorporated by reference), plus any and all ancillary fees and expenses in connection therewith, (collection fees, administrative fees, interest, penalties, etc.), to the same effect as if the said $51,602.83 was never added to the July 2003 tax bill.

IT IS FURTHER ORDERED that Plaintiff's request for attorney fees is denied for the reasons more fully set forth in the Opinion of this Court dated October 26, 2004.

IT IS FURTHER ORDERED that nothing herein shall discharge, release and/or other abrogate any liability which Holmes Enterprises, Inc., may have to the Village of Capac pursuant to St. Clair County Circuit Court action Holmes Enterprises v Village of Capac, St. Clair County Circuit Court No. 02-0934-CZ.

This Judgment resolves the last pending claim and closes the case.

/s/Daniel J. Kelly
HON. DANIEL J. KELLY
Circuit Judge

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF ST. CLAIR

BERNARD PENZIEN and KAREN PENZIEN,

Plaintiffs,

vs.

VILLAGE OF CAPAC, a Michigan
Municipal Corporation, and
MICHIGAN DEPARTMENT OF TREASURY, an
Agency of the State of Michigan.

Defendants.

Case No. K-04-000508-CC
Hon. Daniel J. Kelly

OPINION ON MOTION FOR
SUMMARY DISPOSITION
October 26, 2004

DAVID R. HEYBOER (P-27975)
Attorney for Plaintiffs
Heyboer & Floyd, P.L.L.C.
1530 Pine Grove Avenue, Suite 5
Port Huron, MI 48060
(810) 982-5400

JAMES E. TAMM (P-38154)
Attorney for Defendant Village of Capac
O'CONNOR, DeGRAZIA, TAMM & O'CONNOR, P.C.
4111 Andover Road, Ste. 300 East

Bloomfield Hills, MI 48302
(248) 433-2000

Plaintiffs, Bernard and Karen Penzien, have filed the instant Motion for Summary Disposition, the third summary disposition motion in this case. The facts as set forth in the parties' briefs and also in previously Opinions issued by this Court are not in dispute and need not be restated here. The only remaining issue before this Court involves Count I or Plaintiffs' Complaint, the quiet title claim.

In its previous Opinion, this Court found that the manner in which Defendant Village of Capac provided notice of the dangerous building satisfied the requirements of MCL 125.541, but not MCL 125.534; and therefore, the effect of the resulting lien place on the property would be determined by the provisions in MCL 125.541. Subsection (7) of MCL 125.541 provides that a lien may be placed on the real property pursuant to a judgment. Judge Deegan issued an Order in case number 02-0934-CZ providing for such a lien. This Court does not question the validity of Judge Deegan's Order, nor the reasoning behind it. Furthermore, this Court does not attempt to "overrule" the Order, or to interfere with Judge Deegan's jurisdiction in the case between Holmes Enterprises and the Village of Capac. Subsection (7) expressly provides for such a lien to be placed. This subsection, however, clearly states that such a lien "does not have priority over prior filed or recorded liens and encumbrances." MCL 152.541(7). Therefore, Capac's lien would be considered a junior lien on the property. The effect of the land contract forfeiture on this junior lien is similar to what would occur when a bank forecloses a mortgage on the property that is also encumbered by liens that are junior to the mortgage: all of the junior interests are extinguished unless redeemed. There is no dispute in this

case that redemption did not occur. The line placed on the property by the Village of Capac in this case was not extinguished by any action of this Court. Rather, it was left without any force or effect because Capac did not redeem in the forfeiture process. Therefore, it now constitutes a cloud on the Penziens' title, and they are entitled to have the lien removed from the property.

Plaintiffs have also requested in their summary disposition motion that a hearing be held to determine damages and attorney fees on a slander of title theory. There has been no showing that the Village of Capac slandered Plaintiffs' title. As is evidenced by the extensive briefs filed by the parties, and the amount of time this Court has spent considering the legal issues therein, there are certainly two ways of viewing this case. Although this Court ultimately disagreed with the legal arguments set forth by the Village of Capac, it is clear that Capac's attorneys proceeded based on legitimate interpretations of the law. Capac should not be forced to pay damages and attorney fees based on a slander of title theory for what appears to this Court to be a good faith pursuit of an arguable legal position.

For the reasons set forth above, Plaintiffs' Motion for Summary Disposition is GRANTED as to Count I of Plaintiff's Complaint; however, no hearing will be held on the issue of damages or attorney fees, as this Court has found that Plaintiffs are not entitled to them. An order consistent with this Opinion may be presented for entry as provided by court rule.

Dated: 10-26-04 /s/Daniel J. Kelly
Hon. Daniel J. Kelly, Circuit Judge

APPENDIX E

CAPAC VILLAGE CODE
ARTICLE III. DANGEROUS BUILDINGS

Sec. 6-68. Notice.

When the whole or any part of any building or structure is found to be in a dangerous condition, the building inspector shall issue a notice which shall specify the nature of the dangerous condition and the repair or demolition necessary to make the building or structure safe.

(1) The notice shall be directed to the person in whose name the property appears on the most recent village tax assessment records.

(2) The notice shall specify the time and place of a hearing before the village council at which the person to whom the notice was directed shall have the opportunity to contest the findings of the building inspector.

(Ord. No. 90-3, §3, 7-16-1990)

* * *

(b) If it is determined by the village council that the building or structure should be repaired, demolished or otherwise made safe, it shall so order, fixing a time within which compliance must be completed.

(c) A copy of the decision of the village council shall be sent by regular mail or otherwise delivered to the person to whom the original notice was sent.

(Ord. No. 90-3, §5, 7-16-1990)

* * *

Sec. 6-72 Failure to comply; lien.

If the responsible persons do not comply with the village council's decision within the time specified, the village may arrange to have the required repair, demolition or other work completed. The cost of such required repair, demolition or other work shall be a lien against the real property on which the building or structure is located and shall be assessed against such real property on the next tax roll.

(Ord. No. 90-3, §7, 7-16-1990)

Sec. 6-73. Appeal to circuit court.

A person affected by a village council decision requirement the repair, demolition or other work on a building or structure, in which such person has an interest, may appeal the decision to the circuit court by filing an action within 20 days from the date of the decision by the village council.

(Ord. No. 90-3, §8, 7-16-1990)

APPENDIX F

MCLA 125.532:

Sec. 132. (1) If, upon inspection, the premises or any part of the premises are found to be in violation of any provision of this act, the enforcing agency shall record the violation in the registry of owners and premises.

(2) The owner, and, in the enforcing agency's discretion, the occupant, shall be notified in writing of the violation. The notice shall state the date of the inspection, the name of the inspector, the nature of the violation, and the time within which the correction shall be completed.

MCLA 125.534:

(1) If the owner or occupant fails to comply with the order contained in the notice of violation, the enforcing agency may bring an action to enforce this act and to abate or enjoin the violation.

* * *

(4) Owners and lienholders of record or owners and lienholders ascertained by the complainant with the exercise of reasonable diligence shall be served with a copy of the complaint and a summons. The complainant shall also file a notice of the pendency of the action with the appropriate county register of deeds office where the premises are located.

MCLA 125.540

Sec. 140 (1) Notwithstanding any other provision of this act, if a building or structure is found to be a dangerous building, the enforcing agency shall issue a notice that the building or structure is a dangerous building.

(2) The notice shall be served on the owner, agent, or lessee that is registered with the enforcing agency under section 125. If an owner, agent, or lessee is not registered under section 125, the notice shall be served on each owner of or party in interest in the building or structure in whose name the property appears on the last local tax assessment records.

* * *

(5) The notice shall be in writing and shall be served upon the person to whom the notice is directed either personally or by certified mail, return receipt requested, addressed to the owner or party in interest at the address shown on the tax records. If a notice is served on a person by certified mail, a copy of the notice shall also be posted upon a conspicuous part of the building or structure. The notice shall be served upon the owner or party in interest at least 10 days before the date of the hearing included in the notice."

MCLA 125.541

(2) If the hearing officer determines that the building or structure should be demolished, otherwise made safe, or properly maintained, the hearing officer shall so order, fixing a time in the order for the owner, agent, or lessee to comply with the order. If the building is a dangerous building under section 139(j) . . . .

* * *

(4) The legislative body or the board of appeals of the city, village, or township, as applicable, shall fix a date not less than 30 days after the hearing prescribed in section 140 for a hearing on the findings and order of the hearing officer and shall give notice to the owner, agent, or lessee in the manner prescribed in section 140 of the time and place of the hearing. . . . If the legislative body or board of appeals approves or modifies the order, the legislative body shall take all necessary action to enforce the order. If the order is approved or modified, the owner, agent, or lessee shall comply with the order within 60 days after the date of the hearing under this subsection.

* * *

(5) The cost of the demolition . . . shall be reimbursed to the city, village, or township by the owner or party in interest in whose name the property appears.

(6) The owner or party in interest in whose name the property appears upon the last local tax assessment records shall be notified by the assessor of the amount of the cost of the demolition, of making the building safe, or of maintaining the exterior of the building or structure or grounds adjoining the building or structure by first class mail at the address shown on the records. If the owner or party in interest fails to pay the cost within 30 days after mailing by the assessor of the notice of the amount of the cost, the city, village, or township shall have a lien for the cost incurred by the city, village, or township to bring the property into conformance with this act. The lien shall not take effect until notice of the lien has been filed or recorded as provided by law. A lien provided for in this subsection does not have priority over previously filed or recorded liens and encumbrances. The lien for the cost shall be collected and treated in the same manner as provided for property tax liens under the general property tax act, Act No. 206 of the Public

Acts of 1893, being sections 211.1 and 211.157 of the Michigan Compiled Laws.

(7) In addition to other remedies under this act, the city, village, or township may bring an action against the owner of the building or structure for the full cost of the demolition, of making the building safe, or of maintaining the exterior of the building or str5ucture or grounds adjoining the building or structure. A city, village, or township shall have a lien on the property for the amount of a judgment obtained pursuant to this subsection. The lien provided for in this subsection shall not take effect until notice of the lien is filed or recorded as provided by law. The lien does not have priority over prior filed or recorded liens and encumbrances.

APPENDIX G

DETERMINATION OF CAPAC VILLAGE COUNCIL AFTER DANGEROUS BUILDING HEARING REGARDING 101 AND 103 SOUTH MAIN STREET, CAPAC

At a hearing and meeting of the
Council of the Village of Capac
held March 18, 2002

A report of the Building Inspector of the Village of Capac dated January 7th,2002 and the report of Dunn Construction and Engineering dated February 18th, 2002 having been presented to the Village of Capac Village Council by the Village Building Inspector, finding the building at 103 Main Street, Capac, Michigan, to be a dangerous building as defined by Capac Village Ordinance Article III, Section 6-6 *et seq*, and notice having been served pursuant to Capac Village Ordinance to the person whose name the property appears in the most recent Village Tax Assessment records and also posted at 103 South Main Street,, Capac, Michigan, all interested parties having been allowed to appear and be heard and after full consideration of report and recommendation of the Capac Building Inspector,

IT IS HEREBY DETERMINED for the health, safety and welfare of the residents of the Village of Capac and the general public pursuant to article III, Section 6-6 *et seq* that:

1. The building located at and commonly referred to as 101 and 103 South Main Street, Capac, Michigan, is a dangerous building as defined by the Capac Ordinances. Said premises being more specifically described as those premises situated in the Village of Capac, St. Clair County, Michigan, to-wit:

Lot 1, except the West 36 feet thereof also the North 10 feet of the East 114 feet of Lot 1, B1S, R1W, Part of the Village of Capac.

2. Said building is determined to be a dangerous building as defined by ordinance shall be repaired, demolished or otherwise made safe.

3. The owner shall repair, demolish or make safe said or building within twenty (20) days from the date of this determination.

4. If the owner or other interested party fails to repair, demolish or otherwise make safe said building within the twenty (20) day time period, upon the recommendation of the Capac Building Inspector, the Village shall demolish said building with the cost of such demolition work to be made a lien against the real property on which the building is located and assessed against the real property on the next tax roll.

5. A person affected by a Village Council decision requiring the repair, demolition or other work on a building or structure in which such person has an interest, may appeal the decision to the circuit court by filing an action within 20 days from the date of this decision by the Village Council.

/s/Bruce Lawrence
BRUCE LAWRENCE, President

/s/Debra L. Hlubic
DEBRA L. HLUBIC, Clerk

I hereby certify that the foregoing constitutes a true and complete copy of a Determination of Capac Village Council after Dangerous Building hearing Regarding 101 and 103 South Main Street, Capac, Michigan adopted by the Council of the Village of Capac, County of St. Clair, Michigan, at a hearing held on March 18th, 2002, and that said hearing was conducted and public notice of said meeting was given pursuant to and in full compliance with the Open Meetings Act, being Act 267, Public Acts of Michigan, 1976, and that the minutes of said meeting were kept and will be or have been made available as required by said Act.

/s/Debra L. Hlubic
DEBRA L. HLUBIC, Clerk

APPENDIX H

BOOK 2649 PAGE 01
CLERK REGISTER
ST. CLAIR COUNTY

RECEIVED FOR RECORD
FEB. 19 2003
LIBER 2649 PAGE 1 TIME 8:20 A.M.

/s/Marilyn Dunn
MARILYN DUNN

DANGEROUS BUILDING ASSESSMENT LIEN

Notice is hereby given that on March 18, 2002, the Village of Capac, Village Counsil determined the following property to be a dangerous building as defined by Capac Village Ordinance Article III, Section 6-6 *et seq*:

> Lot 1, except the West 36 feet thereof also the North 10 feet of the East 114 feet of Lot 1, B1S, R1W, Part of the Village of Capac.

As of February 3, 2003, the Village of Capac hereby places a lien pursuant to village ordinance in the amount of fifty one thousand two hundred thirty-nine ($51,239.00), plus future costs, attorney's fees, interest, penalties and fees. Owner: Bernard P. Penzien and Karen S. Penzien, husband and wife; Subject to the Land Contract Purchasers interest of Holmes Enterprises, Inc.

Village of Capac

/s/Debra L. Hlubic
by: Debra L. Hlubic
Its: Clerk
131 North Main Street
Capac, Michigan 48014

State of Michigan)
County of St. Clair)

Subscribed and sworn to before me this 2/03/03.

/s/Keith D. Zick
Keith D. Zick
Notary Public-St. Clair County, Michigan
My commission expires: 7-6-04

Prepared by and return to:
Keith D. Zick
Michael L. Hulewicz
BEAUCHAMP, KELLY, WHIPPLE, ZICK,
KEYES & HULEWICZ
627 Fort Street
Port Huron, Michigan 48060
(810) 987-4111

APPENDIX I

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF ST. CLAIR

BERNARD PENZIEN and KAREN PENZIEN,

Plaintiffs,

vs.

VILLAGE OF CAPAC, a Michigan
Municipal Corporation, and
MICHIGAN DEPARTMENT OF TREASURY, an
Agency of the State of Michigan.

Defendants.

Case No. K-04-000508-CC
Hon. Daniel J. Kelly

AFFIDAVIT

DAVID R. HEYBOER (P-27975)
Attorney for Plaintiffs
Heyboer & Floyd, P.L.L.C.
1530 Pine Grove Avenue, Suite 5
Port Huron, MI 48060
(810) 982-5400

JAMES E. TAMM (P-38154)
Attorney for Defendant Village of Capac
O'CONNOR, DeGRAZIA, TAMM & O'CONNOR, P.C.

4111 Andover Road, Ste. 300 East
Bloomfield Hills, MI 48302
(248) 433-2000

STATE OF MICHIGAN)
) **AFFIDAVIT**
COUNTY OF ST. CLAIR)

Bernard Penzien, being duly sworn, deposes and says:

1. That he is the owner of real estate described as: Land in the Village of Capac, St. Clair County, Michigan, described as:

> The East 114 feet of Lot 1 and the East 114 feet of the North 10 feet of Lot 2, Block 1 North, Range 1 West, except the West 12 feet of Right-of-Way, Village of Capac, according to the plat thereof as recorded in Liber H of Plats, page 72, St. Clair County Register of Deeds Office.

and commonly known as 101-105 S. Main Street, Capac, Michigan.

2. That on March 4, 1997, the property in question was owned by the Bernard Penzien Trust and was sold to Sam Dado and others under a land contract.

3. That on April 11, 1997, the Bernard Penzien Trust transferred the property to Bernard Penzien and Karen Penzien, husband and wife.

4. That on November 11, 1999, the original land contract vendees, Sam Dado, et al., did assign the land contract to Holmes Enterprises.

5. That your Affiant is an attorney at law doing business in Imlay City, Michigan.

6. That at no time did Affiant receive any notice from the Village of Capac regarding the issues concerning the allegations of a dangerous building or the hearing to order the demolition of the building.

7. That at no time did Affiant receive notice of the lawsuit which was pending before the Honorable Peter E. Deegan.

8. That on October 23, 2002, Affiant was informed that work crews on behalf of the Village of Capac had commenced demolition of the building.

9. That prior to October 23, 2003, Affiant had hired attorney David R. Heyboer to proceed with a land contract forfeiture, and due to the issues surrounding a potential of State and/or Federal tax liens against the interest of Sam Dado, et al., and Holmes Enterprises, David R. Heyboer did order title work to determine the exact status of the title, as well as any other interests against the property.

10. That on October 23, 2002, attorney David R. Heyboer, upon being informed of the demolition, did demand in writing that the demolition immediately cease, to which the Village of Capac refused.

11. That the building was torn down and in a pile of rubble on Thursday morning, October 24, 2002, when Plaintiffs sought to intervene, all of which was then a nullity.

12. That in March 2003, the Village of Capac placed a special assessment against the property and mailed a copy to Affiant, despite the fact that the land contract interest of Holmes Enterprises remained in full force and effect.

/s/Bernard Penzien
BERNARD PENZIEN

Subscribed and sworn to before me this 3rd day of May, 2004.

/s/Debra L. Sutherby
Debra L. Sutherby, Notary Public
Lapeer County, Michigan
My commission expires: 07-1-05

APPENDIX J

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF ST. CLAIR

BERNARD PENZIEN and KAREN PENZIEN,

Plaintiffs,

vs.

VILLAGE OF CAPAC, a Michigan Municipal Corporation, and MICHIGAN DEPARTMENT OF TREASURY, an Agency of the State of Michigan.

Defendants.

Case No. K-04-000508-CC
Hon. Daniel J. Kelly

AFFIDAVIT

DAVID R. HEYBOER (P-27975)
Attorney for Plaintiffs
Heyboer & Floyd, P.L.L.C.
1530 Pine Grove Avenue, Suite 5
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(810) 982-5400

JAMES E. TAMM (P-38154)
Attorney for Defendant Village of Capac
O'CONNOR, DeGRAZIA, TAMM & O'CONNOR, P.C.

4111 Andover Road, Ste. 300 East
Bloomfield Hills, MI 48302
(248) 433-2000

STATE OF FLORIDA)
)
COUNTY OF PINELLAS)

AFFIDAVIT

Karen Penzien, being duly sworn, deposes and says:

1. That she is the co-owner of the property which is the subject of this litigation and with an interest as tenants by the entirety.

2. That Karen Penzien is the spouse of Bernard Penzien.

3. That at no time has Karen Penzien received any notice from the Village of Capac by mail or otherwise concerning the issues regarding the Village's dangerous building ordinance and/or requests to demolish the property.

4. That at no time whatsoever did Karen Penzien ever receive notice that a lawsuit was pending before the Honorable Peter E. Deegan.

/s/Karen Penzien
KAREN PENZIEN

Subscribed and sworn to before me this 9th day of May, 2004.

/s/Susan Harris
Susan Harris, Notary Public
Pinellas County, Florida
My commission expires: August 15, 2006

APPENDIX K

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF ST. CLAIR

BERNARD PENZIEN and KAREN PENZIEN,

Plaintiffs,

vs.

VILLAGE OF CAPAC, a Michigan
Municipal Corporation, and
MICHIGAN DEPARTMENT OF TREASURY, an
Agency of the State of Michigan.

Defendants.

Case No. K-04-000508-CC
Hon. Daniel J. Kelly

AFFIDAVIT

DAVID R. HEYBOER (P-27975)
Attorney for Plaintiffs
Heyboer & Floyd, P.L.L.C.
1530 Pine Grove Avenue, Suite 5
Port Huron, MI 48060
(810) 982-5400

JAMES E. TAMM (P-38154)
Attorney for Defendant Village of Capac
O'CONNOR, DeGRAZIA, TAMM & O'CONNOR, P.C.

4111 Andover Road, Ste. 300 East
Bloomfield Hills, MI 48302
(248) 433-2000

STATE OF MICHIGAN)
) **AFFIDAVIT**
COUNTY OF ST. CLAIR)

David R. Heyboer, being duly sworn, deposes and says:

1. That he is the attorney for Plaintiffs.

2. That he has reviewed the real property tax roll for Capac as submitted to the County by the Village of Capac.

3. That the 1996 tax roll documents on the records of the St. Clair County Treasurer, effective June 21, 1996, for the property which is the subject matter of this litigation, was under the name of Bernard Penzien.

4. That the 1997 tax roll documents on the records of the St. Clair County Treasurer, effective June 17, 1997, for the property which is the subject matter of this litigation, was under the name of Bernard Penzien.

5. That the 1998 tax roll documents on the records of the St. Clair County Treasurer, effective June 22, 1998, for the property which is the subject matter of this litigation, was under the names of Bernard and Karen Penzien.

6. That the 1999 tax roll documents on the records of the St. Clair County Treasurer, effective June 23, 1999, for the property which is the subject matter of this litigation, was under the name of Holmes Enterprises.

7. That the subsequent tax years remained in the name of Holmes Enterprises.

/s/David R. Heyboer
DAVID R. HEYBOER (P-27975)

Subscribed and sworn to before me this 27 day of April, 2004.

/s/Julie J. Kuehn
Julie J. Kuehn, Notary Public
St. Clair County, Michigan
My commission expires: 05-7-05

APPENDIX L

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF ST. CLAIR

BERNARD PENZIEN,

Plaintiff,

vs.

VILLAGE OF CAPAC and MICHIGAN DEPARTMENT OF TREASURY,

Defendants.

Case No. 04-000508-CC
Hon. Daniel J. Kelly

TRANSCRIPT

MOTIONS BEFORE THE HONORABLE DANIEL J. KELLY, CIRCUIT JUDGE
Port Huron, Michigan - Monday, May 10, 2004

APPEARANCES:

For the Plaintiff: DAVID R. HEYBOER (P27975)
Law Offices of Heyboer & Floyd
1530 Pine Grove Avenue
Suite 5

Port Huron, MI 48060
(810) 982-5400

For Defendant Village of Capac
JAMES E. TAMM (P-38154)
O'Connor, DeGrazia & Tamm P.C.
4111 Andover Road
Suite 300E
Bloomfield Hills, Michigan 48302
(248) 433-2000

REPORTED BY:
Pamela Lindsay, CSR & CER 5211
Certified Shorthand Reporter
(586) 447-3800

[By James Tamm, Counsel for Defendant Capac]

Very briefly, your Honor, I think this is -- is adequately addressed in our papers, but as Mr. Heyboer indicated this is an action that resulted when property located in the Village of Capac burned. Mr. Penzien was the Land Contract vendor. The Land Contract vendee was Holmes Enterprises. Mr. Penzien had assigned that Land Contract to Holmes enterprises, and by virtue of that Land Contract Holmes Enterprises was required to be the taxpayer. They were the taxpayer of record. Under both State Law and Village Ordinance the taxpayer of record is the individual who received notice as to dangerous buildings. Notice was appropriately given.

* * *

Plaintiffs' particular argument -- they -- they actually raised several claims attacking the notice provisions, saying that they didn't adequately receive notice, and -- and the constitutionality of the action taken by the Village. It was all

taken pursuant to the order of Judge Deegan of which there was adequate notice by Judge Deegan's own determination. He found that the notice was adequate. And it was pursuant to that order that we entered onto this property and demolished it. Judge Deegan's order also allowed the Village of Capac to file -- gave us a lien. So all of those items are by virtue of court order.

Mr. Penzien claims that he didn't have notice, and in particular that notice wasn't served upon him. But the Village isn't obligated to serve him with notice under the statute. We're obligated to serve the taxpayer of record, and Mr. Penzien, if the Court would look to the Land Contract, required that Holmes Enterprises be the taxpayer of record.

* * *

I know that Plaintiff wants to argue that they should have gotten actual notice or there was an ability for them to get actual notice, but their contract provided that the Land Contract vendee was to be the taxpayer. State Law requires us to list the Land Contract vendee. They -- they apply for the tax records. And, actually, that's all taken care of by the county, not by the Village. So we did comply with that, your Honor.

* * *

APPENDIX M

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF ST. CLAIR

HOLMES ENTERPRISES, INC.,

Petitioner,

vs.

VILLAGE OF CAPAC,

Respondent.

Case No. D-02-0934-CZ
Hon. Peter E. Deegan

JUDGMENT IN FAVOR OF RESPONDENT

MICHAEL W. ROGENSUES P34639
Attorney for Petitioner
32509 Utica Road
Fraser, Michigan 48026
(586) 294-5600

BEAUCHAMP, KELLY, WHIPPLE, ZICK,
KEYES & HULEWICZ, P.L.L.C.
KEITH D. ZICK P24154
Attorney for Respondent
627 Fort Street
Port Huron, Michigan 48060
(810) 987-4111

At a session of court
held September 19, 2002

PRESENT: Hon. Peter E. Deegan, Circuit Judge

This cause having come on to be heard upon a trial of the Complaint filed herein, the Court having considered the pleadings in this matter including the record of the Village Council, the briefs filed by the parties, the motion of the respondent and no proofs having been offered by petitioner;

IT IS HEREBY ORDERED AND ADJUDGED:

Judgment is hereby entered in favor of Respondent, VILLAGE OF CAPAC, and the decision of the Village of Capac Council to demolish the unsafe and dangerous building at 103-105 South Main Street, Capac, Michigan, is affirmed.

There was proper and sufficient notice provided to Holmes Enterprises, Inc., of a hearing and competent, material and substantial evidence on the record and in the files of the Village of Capac for the determination that the building located at and commonly referred to as 101 and 103 south Main Street, Capac, Michigan, is a dangerous building as defined by the Capac Ordinances. Said premises being more specifically described as those premises situated in the Village of Capac, St. Clair County, Michigan, to-wit:

Lot 1, except the West 36 feet thereof also the North 10 feet of the East 114 feet of Lot 1, B1S, R1W, Part of the Village of Capac.

The Respondent, VILLAGE OF CAPAC, having utilized a competitive bidding process shall forthwith demolish said

building with the cost of demolition to be a lien against the real property on which the building is located and assessed against the real property on the next tax roll.

Attorney fees, administrative costs and other expenses in the amount of Five Thousand ($5,000.00) Dollars is awarded to the Village of Council and shall be paid by Holmes Enterprises, Inc., to the Village of Capac within sixty (60) days.

In the event Holmes Enterprises, Inc., does not pay the sum of Five Thousand ($5,000.00) within sixty (60) days the amount of the award shall be increased to the sum of Seven Thousand Seven Hundred Ten ($7,710.00) Dollars and shall be a lien against the real property on which the building is located and assessed against the real property on the next tax roll.

The amount of the line for demolition of the building and the $7,710 lien for attorney fees, administrative costs and other expenses shall be established by execution and recording with the Register of Deeds Office an affidavit executed by the Village of Capac Clerk attesting to the cost of demolition and the fees, costs and expenses provided for in this Judgment.

The Court shall retain jurisdiction for purposes of enforcement.

PETER E. DEEGAN
CIRCUIT JUDGE

Approved as to Form:

/s/Michael W. Rogensues/per authority/KZ
MICHAEL W. ROGENSUES
Attorney for Petitioner

APPENDIX N

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF ST. CLAIR

HOLMES ENTERPRISES, INC,

Plaintiff,

vs.

VILLAGE OF CAPAC,

Defendant.

and

BERNARD PENZIEN and KAREN PENZIEN,

Intervening Plaintiffs

Case No. D-02-0934-CZ
HON. PETER E. DEEGAN

EMERGENCY MOTION TO INTERVENE

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NOW COMES Intervening Plaintiffs, Bernard Penzien and Karen Penzien, by and through his attorneys, Heyboer & Floyd, P.L.L.C., and for his Emergency Motion to Intervene says:

1. That Intervening Plaintiff is the fee title holder to property commonly known as 101-105 South Main Street, Capac, Michigan.

2. That Intervening Plaintiff has previously sold the above real property on land contract, which was thereafter assigned to Plaintiff Holmes Enterprises, Inc.

3. That prior to the present, a fire did occur at the subject structure.

4. That upon information and belief, Holmes Enterprises was seeking various repairs and remodeling to the subject property.

5. That following the fire loss Plaintiff did continue to make certain and various land contract payments.

6. That upon information and belief, the Village Council of Capac did vote to demolish the building.

7. That at no time prior to or after have Defendant's provided notice to Intervening Plaintiff of the order to demolish the structure.

8. That upon information and belief, Plaintiff filed the above action against Defendant which resulted in an order affirming the Defendant's decision to demolish Intervening Plaintiff's building.

9. That at no time was Intervening Plaintiff a party to the action; nor was Intervening Plaintiff aware of the underlying proceeding.

10. That on October 23, 2002, at approximately 3:30 p.m., Intervening plaintiff received a telephone call that the building was being demolished.

11. That counsel for Intervening Plaintiff immediately contacted the attorney for Defendant and demanded that the demolition immediately cease.

12. That upon information and belief, despite the telephone call from counsel, as well as a follow-up letter, the demolition continued until the close of business on October 23, 2002.

13. That upon information and belief, the building, while damages by Defendant, can be salvaged and repaired so that it will remain a valuable assets to Intervening Plaintiff.

14. That Defendant is proceeding with the demolition of the building under this Court's authority, and as such, the issues herein raised should properly be addressed by this Court.

15. WHEREFORE, for the foregoing reasons, your Intervenors requests this Court grant his Motion and allow them to proceed in the above matter.

HEYBOER & FLOYD, P.L.L.C.
Attorneys for Defendant

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